No. 4122

United States Circuit Court of Appeals

For the Ninth District

THE MOHAWK RUBBER COMPANY, of New York, Inc., a Corporation,
Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHERRILL,
Individually and as co-partners doing business under the firm name and style of Munnell & Sherrill,
Defendants in Error.

MOTION OF RESPONDENTS IN ERROR FOR REHEARING

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Defendants in Error.

PETITION FOR REHEARING

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BEACH & SIMON, S. J. BISCHOFF,
Attorneys for Plaintiff in Error

W. M. CAKE, RALPH H. CAKE and L. A. LILJEQVIST,
Attorneys for Defendants in Error.

The defendants in error respectfully petition the court to grant a rehearing in the above entitled case with particular reference to the following features thereof:

(a) The credit claimed by the defendants of the sum of $249.44;

(b) The credit claimed by the defendants of the sum of $9,814.20.

We are left in doubt as to whether or not we fully presented our case in reference to these two matters inasmuch as the opinion is silent as to each of them, and we were firmly of the opinion that our contentions in respect to them were most strongly supported by the evidence, not only on behalf of the defendants, but by the evidence for the plaintiff.

First, as to the $249.44. The letter of Mohawk Rubber Company (Exhibit 45, Transcript page 368) announces that claims for rebates for tires purchased since September 15, 1921, and on hand unsold November 15, 1921, will be recognized upon the serial sizes and complete information sent in. The defendants by letter of November 21, 1921, (Exhibit 43) enclose a list in accordance with the letter from Mohawk Rubber Company. No objection to this list was made. Based upon the list enclosed by the defendants, the plaintiff credited the defendants with $111.68. The basis of calculation is the difference between the old price on May 10, 1921, as shown by the price list, Defendants' Exhibit 3, and the new price on November 15, 1921, as shown by the price list, Defendants' Exhibit 45. It becomes simply a question of mathematical computation which is made in our brief on page 62 thereof. No word appears in the evidence attempting on the part of plaintiff's witnesses to make any explanation of this difference, which amounts to $137.76.

Second, the credit claimed by Respondents of $9,814.20 will now be considered.

Very respectfully, but because of its great importance to the defendants, we presume to briefly call the Court's attention to certain portions of the evidence bearing on this question.

For the purpose of identification, we will call the transaction which Mr. Fitzgerald conducted in which the notes were given, "the note transaction," and that involving the claim of credit of $9,814.20 "the Cassidy deal." The first occurred December 2, 1920, and the second September 18, 1921, and in so far as the reasons and cause of the claim for credit in the Cassidy deal are concerned there is clearly no connection between the two.

We are forced to infer from the opinion that the lack of authority in Mr. Fitzgerald in the "note transaction" proved the lack of authority on the part of Fitzgerald in the "Cassidy deal," but we submit that the evidence of authority lacking in the note transaction was supplied in the Cassidy deal, and such additional confirmation of authority by the plaintiff appears in that deal, that we are at a loss to doubt Fitzgerald's authority in the latter deal, and therefore are compelled to request a rehearing.

The portion of our brief covering this point is shown on pages 65 to 112.

It appears undisputed that plaintiff requested defendants to give up the agency of Mohawk tires to American Tire &

Rubber Company, of which Mr. Cassidy was the proprietor, the negotiations leading up thereto appearing in the testimony of Fitzgerald, plaintiff's agent and witness. (Trans. pp. 482-491 inclusive.)

Fitzgerald had authority with respect to territorial arrangements, etc. (Plaintiff's Exhibit KK, trans. p. 188.) His arrangements for the transfer of the agency to Cassidy have never been questioned. To the extent, then, of completing the transfer of the agency and incidental matters in relation thereto, his authority has been accepted as complete. Necessarily, Cassidy had to have some stock, and, necessarily, the source from which the stock would be secured and the disposition of defendants' stock would be pertinent to the negotiations and settlement of the transfer, hence on page 490 of the Transcript there appears the following question propounded to Fitzgerald by plaintiff's attorney, and Fitzgerald's answer:

> "Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy *if he would accept the whole or any part of the merchandise?*
>
> "A. Correct."

Let us consider for a moment that the letter of November, 1920, (Transcript p. 188) advised the defendants of the limits of Fitzgerald's authority, and that he would have to have further authority to actually agree to the transfer of the account to the extent of $9,814.20 from the defendants to Cassidy. Was there such additional authority, and does that appear in the evidence in this case?

This stock of tires was taken over by Cassidy sending his truck to the defendants and transferring them to his own stock. This act of Cassidy was pursuant to the letter of Fitzgerald of the 18th of September, 1921, wherein he states:

> " . . . Any Mohawk tires or tubes that you have in stock at present, and *in any quantity or sizes that may be agreeable to yourselves and the said George H. Cassidy.*"

Fitzgerald then on cross examination responds as follows:

> "Q. In other words, the things that you did . . . .
>
> "A. I was within my authority.
>
> "Q. The contracts you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn't you?
>
> "A. I did."

Fitzgerald did write this letter. He did authorize defendants to deliver to Cassidy "any Mohawk tires or tubes that you have in stock, and in any quantity or sizes that might be agreeable to yourselves and the said George H. Cassidy."

Fitzgerald's testimony, then, that he did have authority to make any contracts that he made and consummate any deals that he did consummate, we respectfully submit, is a

statement that he did have authority to order these tires to be transferred from defendants to Cassidy, because he did order these tires to be transferred by defendants to Cassidy.

Fitzgerald's opinion of his authority might not be sufficient in the minds of the court to bind his principal, but that he did the things stated and that he did testify that he had such authority is proven by the letter and his testimony, and so far as the value of his testimony is concerned, he has established his authority to write the letter of September 18, 1921.

That his action came within his authority is borne out by the expressed judgment of the plaintiff's attorney when he asks, (Trans. p. 490.)

> "Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy, *if he would accept the whole or any part of the merchandise?*
>
> "A. Correct."

In other words, the fact established that Fitzgerald wrote the letter of September 8th, his testimony that he had authority to do anything that he did do, nothing remains but the construction of the letter. If, however, the opinion of the court indicates that more than Fitzgerald's testimony would be required to show authority, it is in the evidence and from the pen of the plaintiff.

The remarkable thing in determining Fitzgerald's authority, and which, in view of the opinion of the court, com-

pels the conclusion that we did not bring out clearly his full authority, is the letter of Mr. Mason over the name of Mohawk Rubber Company to the defendants, dated November 14, 1921 (Plaintiff's Exhibit GGG, trans. pp. 273-4) wherein Mr. Mason writes:

> "The permission which you were given to deliver tires to the American Tire and Rubber Company says *very distinctly* that the tires were to be delivered in *any quantity* or sizes that might be agreeable to yourselves and Mr. Cassidy. It is our understanding that he did *not* request *nor agree* to the return of this lot of tires in question."

Mr. Mason is the man who, in his deposition, states that he is the sole depositary of authority of the Mohawk Rubber Company, plaintiff in this case, and he states, in effect, that it is his understanding that Mr. Fitzgerald had given his permission to the defendants to deliver to Cassidy the tires in any quantity or sizes that might be agreeable to Cassidy and the defendants, and that very distinctly appears. Is this a confirmation of the authority of Fitzgerald to write that letter of September 18, 1921, or is it a ratification, because, we respectfully submit, it must be one of the two? In either case, an endorsement of Mr. Fitzgerald's action in writing this letter. In other words, Mr. Mason on November 14, 1921, had the same understanding of the permission given by Mr. Fitzgerald's letter of September 18th that the defendants had and that Mr. Cassidy had, but he did not know that Cassidy had requested and did agree to the return of the tires in question.

If Mr. Mason, on November 14th, did read this letter of Fitzgerald's and construe it as he did in his letter of that date, how can the defendants be held liable for construing it as he did and delivering the tires to Cassidy?

To put into Fitzgerald's letter of September 18th the provision that Fitzgerald only gave permission to the defendants to deliver such tires as Cassidy could "use" and "retain" (as contained in telegram of October 12th, 1921, Trans. p. 257) is to put into the letter something that is not there, and we have searched the record in vain to find any conversation relating or hinted that would justify the insertion of such a thought in that letter.

It is true Mr. Mason in his letter says, "It was clearly understood that this (permission to deliver tires to Cassidy) was merely permission for him (Cassidy) to draw upon your stock for such goods as he might need," but this is only Mr. Mason's statement of the transaction necessarily hearsay; no evidence of such understanding appears anywhere in the record, and if such had been understood, from the very nature of the case, it would have been with Cassidy and not defendants, or at least Cassidy would have been responsible to plaintiff and not defendants.

So, in view of the foregoing, Judge Bean instructed the jury, and likewise said in effect in denying the motion for new trial, as follows:

> "Now, the contract is evidenced by the writing —the Fitzgerald letter of September 18, 1921. Under the contract the defendants are entitled to a

> credit for such tires as they delivered to Cassidy *and which were agreeable to him* and are entitled only to credit for such tires as were delivered and agreeable to Mr. Cassidy. It is therefore incumbent upon the defendants to establish what quantity of merchandise was delivered to Cassidy and agreeable to him, and it is immaterial how much they sent over, and it is also immaterial what disposition Cassidy made of the tires as far as the plaintiff is concerned. *The only question for you to determine is, if the contract was made how much of the merchandise delivered by the defendants to Cassidy was agreeable to him.*" (Trans. p. 529.)

It seems clear to us that plaintiff is forced to claim that it had nothing to do with the tires in question, not because Mr. Fitzgerald had no authority to write the letter and authorize their delivery to Mr. Cassidy, but that Cassidy had not agreed to the return or requested the return of the tires as requested by Mr. Fitzgerald's letter, but that in so far as any authority on the part of Fitzgerald to write it is concerned, it is in clear-cut English language admitted or confirmed and ratified.

In addition to the foregoing, we respectfully attract the court's attention to the following:

On September 21, 1921, the defendants wrote to plaintiff a letter containing the following paragraph:

> "On instructions from Mr. Fitzgerald we have transferred all of our stock of Mohawk tires to the American Tire and Rubber Company. We are send-

ing the numbers to San Francisco asking that they credit our account for same." (Trans. p. 314.)

In response thereto, and without objection to the "instructions from Mr. Fitzgerald," the plaintiff wrote on September 26, 1921, as follows:

"This will acknowledge your letter of September 21, and we note that you have transferred the greater portion of this stock to the American Tire and Rubber Company *in accordance with instructions from Mr. Fitzgerald.* . . . .

"With reference to the keeping of the line for local sale, the writer has not received as yet full information from Mr. Fitzgerald regarding these changes. He had a letter last Saturday that covered a considerable portion of the proposition, and in this he mentioned that he thought that arrangements could be made to have you continue the line; and so far as we are concerned, we shall be mighty glad to have you do it. However, whether or not it can be satisfactorily arranged *depends to a considerable extent upon the third party to the proposition;* but from what Mr. Fitzgerald wrote, they were favorable to having you continue the line in a local way, and we really hope that it may be fixed up in that manner.

"Naturally, you will understand that at this distance from your city and with more or less incomplete information and with a third party to whom we cannot talk, to be considered, *the whole matter is something that will have to be handled by Mr. Fitzgerald.*" (Trans. pp. 315-317.)

From the foregoing letters, namely, September 26, 1921, acknowledging transfer of the stock pursuant to instructions from Mr. Fitzgerald, without objection, referring to the inability to determine the proper course at the distance and in view of the existence of a third party in the transaction with whom they could not talk, that the whole matter should be handled by Fitzgerald, and the letter of November 14, 1921, where the permission to deliver tires to Cassidy is expressed by Mr. Mason, the President and sole depositary of authority of plaintiff, says "very distinctly" that the tires were to be delivered in any quantity or sizes that might be agreeable to the defendants and Cassidy, but he understood that Cassidy did not request or agree to the return of this lot of tires, we submit that the authority of the Mohawk Rubber Company is so clearly given and expressed, that the only remaining question in substance is, was the lot of tires agreeable to himself and the defendants?

We respectfully refer to the testimony of Fitzgerald as follows:

> "Q. What I am asking you is this: It was within the scope of your authority, as a matter of fact, was it not, to have had Munnell & Sherrill, in consideration of cleaning up their business and turning it over to a new distributor, to turn their entire stock over to Cassidy?
>
> "A. *Provided Cassidy would have accepted it.*
>
> "Q. I say that is within the scope of your authority?

"A. I say provided Cassidy had accepted it. (Trans. pp. 509-510.)

"Q. *As a matter of fact, you had an agreement with Cassidy, didn't you, that he should take over these tires, and what he didn't sell or dispose of he should ship back to San Francisco, and you would give him an extra discount?*

"A. *I did.*

(Trans. p. 510.)

On direct examination for plaintiff in error Cassidy testified:

"That any goods that Munnell & Sherrill shipped over to the American Tire & Rubber, I was to accept, that was my understanding; and whatever I sold out of there the Mohawk Company was to bill me for, and whatever was left when the carload of new stuff arrived I had the privilege of shipping to 'Frisco, which I done."

(Trans. p. 452.)

On cross examination Cassidy was asked:

"Q. And you were to sell what you could and what you couldn't sell you were to return to 'Frisco and they would give you credit?

"A. Just about word for word what Mr. Fitzgerald told me. If it hadn't been that way I wouldn't have accepted them . . . wouldn't have accepted the tires.

"Q. The tires were accepted by you, weren't they?

"A. Yes, sir.

"Q. . . . . The amount you got was accepted by you, wasn't it?

"A. Yes, sir."

(Trans. p. 455.)

Cassidy accepted the tires, then. No further proof of this part of the case need be given.

Growing out of the foregoing, we earnestly call attention to the following:

In view of Mr. Fitzgerald's negotiations with Cassidy and the defendants, his letter of September 18, 1921, his taking the stock sizes and necessarily inspecting the stock with the defendants, and in view of Mr. Cassidy's testimony and Mr. Sherrill's testimony, as heretofore set out, indicating their state of mind as to the quantity and sizes that defendants might deliver to Cassidy and Cassidy should take, we earnestly ask if, when Cassidy's truck drove up to the house of Munnell & Sherrill, the defendants were not justified in placing on the truck and delivering to Cassidy at Cassidy's store, the tires in question, and that the receipt of those tires by Cassidy, without objection, relieved the defendants from further consideration of their actual disposition.

The first intimation that authority of Fitzgerald was

denied comes in a telegram October 9, 1921, two weeks after Mr. Mason's letter of the 26th:

> "Steamship Company just notified us large shipment tires received from Portland, our shipping clerk investigated and finds same to be your old stock improperly packed, damaged, dirty and unsalable at regular prices, and we do not propose that it is going to be thrown back on our hands, as you only had the authority of turning over to Cassidy the stock he could use and retain. The shipment is being held at local depot subject to your risk and demurrage charges plus freight. *We might use same at sixty per cent but nothing less.* Wire your disposition.
>
> (Signed) MOHAWK RUBBER COMPANY."

It is a significant fact that this telegram is written from San Francisco and that is where Fitzgerald's headquarters were. Fitzgerald signs the name "Mohawk Rubber Company," and the letter of Mr. Mason of November 14th is in effect as to his, Mr. Mason's view of Mr. Fitzgerald's authority, but Fitzgerald interpolates into his own letter something that cannot be found there in words, that the defendants were only authorized to turn over the stock that Cassidy could use and retain, but it is Fitzgerald denying his own authority.

Assuming, for the sake of argument, that Fitzgerald had the authority to write the letter, if there can be interpolated into this letter the meaning attempted to be put into it by Fitzgerald in his telegram of October 12th from San Francisco, we will have nothing further to say in the case.

So defendant's tires of the agree value of $9,814.20

were found in San Francisco, improperly packed, damaged, dirty and unsalable at regular prices, and there they have remained, so far as we know, for two years and a half.

This is the first intimation of dissent from the deal and transaction inaugurated, promoted and carried out by Fitzgerald, and Munnell & Sherrill *have never been put into possession of the tires,* and so far as they are concerned, they are a total loss.

The tires were not improperly packed, damaged or dirty and in an unsalable condition at regular prices by any act of the defendants. Fitzgerald, with Cassidy and Sherrill, inventoried this stock, the inventory in the record being in the handwriting of Fitzgerald, and it would seem that the stock was considered sufficiently cleanly, undamaged and in such salable condition that it could be properly transferred to Cassidy for sale, and if it was improperly packed, or damaged, or dirty, it must have been so rendered after it left the storerooms of the defendants, with the result that, at least unwittingly but in good faith if the court adheres to its original opinion, the defendants, relying on Fitzgerald, have absolutely lost the tires in question.

It does seem to us that there is an imperative need for correction of the apparent failure to present this question in such light that the court would be sufficiently and completely advised and can plainly see the plight in which the defendants are left.

We most respectfully call attention to the opinion of Judge Bean on the motion for a new trial upon this point and appearing at page 539 of the Transcript.

> "There can be no reasonable question on the record but what Fitzgerald had authority to make the agreement of September, 1921, transferring the business from the defendants to Cassidy, *and under that contract defendants were authorized to turn over to Cassidy any tires or tubes that they had in stock and in any quantity or sizes that might be agreeable to themselves and Cassidy, and for such quantity as was thus turned over they were entitled to credit on their account.* The only question, therefore, on that branch of the case was the quantity and value of the tires delivered to Cassidy in pursuance to such contract."

It may be that Mr. Mason's letter of November, 1921, is a ratification or confirmation of Fitzgerald's authority; in either case we have in our original brief set forth the law applicable, and so need not repeat it here, but this letter, we submit, positively and unequivocally shows the report of Fitzgerald to the home office as to what he had done, with the resultant acceptance thereof on the part of the home office, and its refuge for refusing the credit to Munnell & Sherrill for the tires so delivered, in the belief that Cassidy "*did not request nor agree*" to the return of the tires in question.

Because of the foregoing, we respectfully request the court that a rehearing be granted the defendants with particular reference to the matters set forth in this motion.

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